APPENDIX

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Nagy v. Berkshire Life Ins. Co. of America
N.D.Ill.,2003.
Only the Westlaw citation is currently available.

United States District Court,N.D. Illinois, Eastern Division.

Laszlo NAGY, Plaintiff,
v.
BERKSHIRE LIFE INSURANCE COMPANY OF AMERICA, and The Eugene Cohen Agency, Inc., Defendants.

No. 03 C 2219.

Oct. 20, 2003.

Paul P. Wolf, J. Wesley Mitchell, Mitchell, Hoffman & Wolf, LLC, Chicago, IL, for plaintiff.
Joseph J. Hasman, David Faulkner Schmidt, Chittenden, Murday & Novotny, LLC, David A. Baugh, Mary Kay Morrissey, Mora Baugh Waitzman & Unger, LLC, Chicago, IL, for defendants.

AMENDEDMEMORANDUM OPINION AND ORDER

LEFKOW, J.

*1 On February 20, 2003, plaintiff Laszlo Nagy ("Nagy") filed this action in the Circuit Court of Cook County, Illinois, seeking damages against Berkshire Life Insurance Company of America ("Berkshire") and the Eugene Cohen Agency, Inc. ("Cohen")(collectively "defendants") for breach of contract, negligence, and improper claims practice. On March 31, 2003, Berkshire removed this case to federal court on diversity of citizenship grounds pursuant to 28 U.S.C. § 1446. Before the court is defendants' joint motion to dismiss counts II and III of plaintiff's amended complaint. For the reasons set forth below, this court denies the motion as moot and remands this case to the Circuit Court of Cook County pursuant to 28 U.S.C. § 1447(c) for lack of subject matter jurisdiction.

FACTS

Plaintiff's amended complaint alleges the following facts: On May 2, 2002, Nagy applied to Berkshire for a disability insurance policy. (Am Comp. Ct. I ¶ 4.) Nagy submitted his application for the insurance policy through Cohen, a licensed and registered insurance producer. (*Id.* at ¶¶ 4, 5.) All further communications between Nagy and Berkshire were through Cohen. (Am. Comp. Ct. II ¶ 14.) On May 2, 2002, Nagy paid Berkshire the first premium due under the insurance policy. (Am. Comp. Ct. I at ¶ 6.) Nagy also provided Berkshire with a written authorization to obtain Nagy's medical records. (*Id.* at ¶ 7.) On May 14, 2002, at the request of Berkshire, Nagy submitted to a physical examination, at which time Nagy completed and submitted to Berkshire an "Application for Insurance to Berkshire Life Insurance Company of America (Part 2-Medical)."(*Id.* at ¶¶ 9, 10.)Nagy asserts that by June 18, 2002, he had complied with all the conditions required of him by Berkshire for the issuance of the disability insurance policy and that Berkshire had determined that it would issue Nagy the insurance policy with an exclusion for "asthma and any impairment of the respiratory tract."(*Id.* at ¶¶ 13, 14.)Thus, Nagy asserts that a valid and binding disability insurance contract existed on and prior to June 18, 2002. (*Id.* at ¶ 14.)

On June 25, 2002, Nagy was permanently injured and disabled in a motor vehicle accident. (*Id.* at ¶ 15.)Nagy's disability is not related to "asthma" or "any impairment of the respiratory tract."(*Id.* at ¶ 18.)On the day of the accident, Nagy's wife notified Berkshire of the accident. (*Id.* at ¶ 16.)Berkshire has since refused to pay any amount under the policy. (*Id.* at ¶ 18.)

On February 20, 2003, Nagy filed the instant lawsuit. Nagy subsequently filed a three-count amended complaint on May 27, 2003. Count I alleges that Berkshire breached its insurance contract with Nagy. Count II alleges that Berkshire and Cohen were negligent and that their negligence caused Nagy to lose the benefits of the insurance policy.

Count III alleges that the conduct of Berkshire and Cohen constituted an improper claims practice under Illinois law. Berkshire and Cohen have jointly moved to dismiss Counts II and III.

DISCUSSION

*2 The court first must decide whether federal diversity jurisdiction is proper in this case. This court previously addressed the issue of subject matter jurisdiction. On April 22, 2003, Nagy filed a motion to remand. On May 15, 2003, this court addressed the motion, noting that two issues were raised. (*See* docket # 14.) The first issue was whether removal was timely. The court determined that it was. The second issue was whether the court had subject matter jurisdiction. Nagy claimed that the court lacked subject matter jurisdiction because there was not complete diversity of citizenship between Nagy and Cohen. However, this issue was found to be moot because Nagy represented that he did not intend to replead against Cohen in his amended complaint. Nevertheless, Cohen brings counts II and III of the amended complaint against Cohen. Thus, the court must now determine whether diversity jurisdiction is properly invoked.

This court's diversity jurisdiction may be invoked when an action involves citizens of different states and the amount in controversy exceeds $75,000. 28 U.S.C. § 1332(a)(1). Diversity jurisdiction is only proper in cases where no party shares a common citizenship with any party on the other side of the dispute. *Poulos v. Naas Foods, Inc.*, 959 F.2d 69, 71 (7th Cir.1992) *(citing Strawbridge v. Curtis*, 7 U.S. (3 Cranch) 267, 2 L.Ed. 435 (1806)). A corporation is a citizen of its state of incorporation and its principal place of business. 28 U.S.C. § 1332(c)(1). Nagy, an individual, is a citizen of Illinois. Berkshire is an Massachusetts corporation with its principal place of business in Massachusetts. Cohen is an Illinois corporation with its principal place of business in Illinois. Because Nagy and Cohen are both citizens of Illinois, it would seem that this court lacks diversity jurisdiction.

Defendants, however, allege that Cohen was fraudulently joined as a defendant. Parties fraudulently joined should be disregarded in determining diversity jurisdiction. *Gottlieb v. Westin Hotel Co.*, 990 F.3d 323, 327 (7th Cir.1993). Joinder is fraudulent if there is no "reasonable possibility that a state court would rule against the [in-state] defendant."*Schwartz v. State Farm Mut. Auto. Ins. Co.*, 174 F.3d 875, 878 (7th Cir.1999)(*citing Poulos*, 959 F.2d at 73). An out-of-state defendant seeking to establish federal jurisdiction based on fraudulent joinder of a non-diverse defendant bears the heavy burden of proving that, "after resolving all issues of fact *and law* in favor of plaintiff, the plaintiff cannot establish a cause of action against the in-state defendant."*Poulos*, 959 F.2d at 73 (emphasis in original). Doubts as to the court's jurisdiction are resolved in plaintiff's favor. *Doe v. Allied-Signal, Inc.*, 985 F.3d 908, 911 (7th Cir.1993). This court must determine whether, based on Illinois law, there is a reasonable possibility that an Illinois court would rule against Cohen on counts II or III. If so, then joinder of Cohen was proper and this court must remand the case to the state court. *See*28 U.S.C. § 1447(c)("If at any time before final judgment it appears that the case was removed improvidently and without jurisdiction, the district court shall remand the case.")

*3 Count II of Nagy's complaint alleges, *inter alia*, that Berkshire and Cohen negligently failed to notify Nagy in a timely matter that his insurance application had been denied, causing him to lose the benefits of the policy. (Am Comp.¶ 16.) To state a cause of action against Cohen for negligence, Nagy must allege facts sufficient to show the following elements: (1) the existence of a duty owed by Cohen to Nagy; (2) a breach of that duty; and, (3) injury to Nagy proximately caused by the breach. *See Nielsen v. United States Services Auto. Ass'n*, 244 Ill.App.3d 658, 666-67, 183 Ill.Dec. 874, 612 N.E.2d 526, 532 (2d Dist.1993).

Defendants argue that Nagy cannot state a negligence claim against Cohen because Cohen was an

agent of Berkshire and owed no duty to Nagy. Defendants cite *Bellmer v. Charter Sec. Life Ins. Co.* ., 105 Ill.App.3d 234, 238, 433 N.E.2d 1362, 1366, 61 Ill.Dec. 34, 38 (1982), to support their contention that "absent factual allegations of an agency relationship between the insured and the insurance agent, no duty is imposed on the insurer's agent to notify plaintiff of facts detrimental to the insured for the breach of which negligence liability will lie."In *Bellmer*, an ex-husband, as part of a divorce agreement, was required to continue making premium payments on a policy insuring the life of the plaintiff, his ex-wife. The insurance agent knew of the divorce agreement requirements, yet when the ex-husband became delinquent in the premium payments the agent did not notify the insured. After the ex-husband died, the insured discovered that the policy had lapsed. She sued the agent and insurance company claiming that they had breached their duty to her, as owner of the policy, to inform her of her ex-husband's delinquency within a reasonable period of time. The agent's failure to so notify the plaintiff caused her to be lulled into inaction, and she argued that she was injured by that reliance. The court in *Bellmer* held that the agent did not owe the plaintiff a duty unless he had entered into a separate agreement with the plaintiff requiring that he give her some notice. Since there was no such agreement, the court held that the agent could not be held liable. 105 Ill.App.3d at 239-40, 61 Ill.Dec. 34, 433 N.E.2d 1362. Defendants contend that Cohen similarly cannot be held liable for failure to notify Nagy that his application for the policy had been denied.

Several Illinois cases, however, seem to be in conflict with *Bellmer*. *See, e.g., Talbot v. Country Life Ins. Co.*, 8 Ill.App.3d 1062, 1065, 291 N.E.2d 830, 832 (3d Dist.1973); *Wheaton National Bank v. Dudek*, 59 Ill.App.3d 970, 17 Ill.Dec. 487, 376 N.E.2d 633 (1st Dist 1978); *Rothberg v. Numerovski*, 58 Ill.App.2d 372, 208 N.E.2d 12 (1st Dist.1965). In *Talbot*, for instance, the court held that an insurance company's agent owes an applicant for insurance the duty to act on the application with reasonable promptness. *Talbot*, 8 Ill.App.3d at 1065, 291 N.E.2d 830. Larry Talbot, the husband of the plaintiff, applied in writing to the insurance company's agent for a life insurance policy and paid the first premium. The agent did not notify Talbot of any action taken on the application. Larry Talbot died five months later. The insurance agent attempted to return the premium two days after Larry Talbott died. In finding for the plaintiff, the court held that insurance agents may be liable for negligence if they unreasonably delay, because

*4 the agent ... owes an applicant for insurance what amounts to a legal obligation to act with reasonable promptness on the application, either by providing the desirable coverage or by notifying the applicant of the rejection of the risk so that he may not be lulled into a feeling of security or put to prejudicial delay in seeking protection elsewhere.

Id.

Although somewhat in conflict with *Bellmer*, *Talbot* has not been reversed by the Illinois Supreme Court and appears to be good law in Illinois. *See Geraghty v. Continental Western Life Ins.*, 281 Ill.App.3d 669, 677, 217 Ill.Dec. 421, 667 N.E.2d 510, 515 (Ill.App. 1st Dist.1996)(*citing Talbot* with approval); *see also Ontiveros v.. Am. Heritage Life Ins.*, 635 F.Supp. 216, 220 (N.D.Ill.1986) (applying Illinois law, holding that an insurance agent "may have had a legal duty to act more promptly or to give the insured notice of the lack of coverage."); *Skyview Film & Video, Inc. v. Safeco Life Ins. Co.*, 864 F.Supp. 755 (7th Cir.1994)("It is clear from the *Talbot* opinion that under Illinois law an insurer has a legal obligation to an applicant to process insurance applications within a reasonable period ..."). Evaluating all factual issues and questions on controlling substantive law in favor of the plaintiff, there exists at least a possibility that an Illinois court would hold Cohen liable for breach of his duty to notify Nagy within a reasonable time that his insurance application had been denied. Thus, defendants have not met their heavy burden of proving that Nagy fraudulently joined Cohen.

ORDER

For the reasons set forth above, the court denies the motion to dismiss as moot (# 19) and remands this case to the Circuit Court of Cook County pursuant to 28 U.S.C. § 1447(c) for lack of subject matter jurisdiction.

N.D.Ill.,2003.
Nagy v. Berkshire Life Ins. Co. of America
Not Reported in F.Supp.2d, 2003 WL 22388911 (N.D.Ill.)

END OF DOCUMENT

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Joseph Triner Corp. v. Champale, Inc.
N.D.Ill., 1987.
Only the Westlaw citation is currently available.
United States District Court, N.D. Illinois, Eastern Division.
JOSEPH TRINER CORPORATION, Plaintiff,
v.
CHAMPALE, INC., a foreign corporation, et al., Defendants.
No. 87 C 2980.

October 2, 1987.

MEMORANDUM OPINION

GRADY, Chief Judge.

*1 This diversity case is before us on the motions of defendants G. Heileman Brewing Co. ('Heileman'), Champale, Inc. ('Champale'), and Iroquois Brands Ltd. ('Iroquois') to dismiss the complaint of Joseph Triner Corporation ('Triner') pursuant to Federal Rule of Civil Procedure 12(b)(6). Iroquois also moves to dismiss for lack of personal jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(2). For the reasons below, we grant Heileman's motion in its entirety and grant the motions of Champale and Iroquois in part. Iroquois' Rule 12(b)(2) motion is denied.

FACTS

Triner is an Illinois corporation and operates as a wholesale liquor distributor. Complaint at ¶1. During the 1950's, Triner entered into an oral agreement with Champale, a foreign corporation, and Iroquois, a New Jersey corporation, whereby Triner would distribute Champale brand liquor and malt beverage products.Id. at ¶5. Champale is a wholly-owned subsidiary of Iroquois. Sometime in 1984, Champale and Iroquois granted Triner an exclusive right to distribute additional Champale brand products in an expanded territory. As required by law, Champale registered Triner's distribution territory with the Illinois Liquor Control Commission.Id. at Exhibit A. On March 19, 1986, Champale and Iroquois terminated Triner's distributorship.Id. at ¶11. In December 1986, Heileman, a Wisconsin corporation, purchased certain assets from Champale-including Champale's trademark-and 'now is the only U.S. brewer of Champale brand products.'Heileman Memorandum in Support at 3 ('Heileman Mem.').

Triner filed suit on December 24, 1986, against Heileman, Champale, and Iroquois in the Circuit Court of Cook County. Heileman removed the case to federal court based on diversity of citizenship on April 1, 1987. Triner's complaint is in two counts. Count I, directed against all three defendants, is based on the Illinois Beer Industry Fair Dealing Act, Ill. Rev. Stat. ch. 43, ¶ 301et seq. (1985) ('the Act'). Count II is directed against Champale and Iroquois only and alleges a breach of contract by termination without just cause. All three defendants move to dismiss the complaint for failure to state a claim. Iroquois also moves to dismiss under Federal Rule of Civil Procedure 12(b)(2) for lack of personal jurisdiction. We will consider Heileman's motion first.

DISCUSSION

Heileman

Heileman argues that the Act does not give Triner a cause of action against it. The Act purports to govern 'relations between brewers and their wholesalers.'Ill. Rev. Stat. ch. 43, ¶302. The Act gives wholesalers a judicial remedy when the brewer 'engages in conduct prohibited under this Act . . . [and] . . . the cause of action directly relates or stems from the relationship of the individual parties under such contracts.'Id. at ¶309. Heileman states that Triner never was its wholesaler because Triner's Champale product distributorship was ter-

minated in March 1986, eight months before Heileman purchased certain assets relating to Champale brands from Iroquois and Champale. Heileman Mem. at 3. Heileman never had a contract with Triner to distribute any Champale brand products.Id. at 4-5. Triner does not deny that it had no distributorship agreement with Heileman but argues instead that the Act's definition of a 'brewer' includes a brewer's assigns. Triner Memorandum in Opposition to Heileman at 7 ('Triner Mem.'). The Act defines a brewer as 'a person who is engaged in the manufacture of beer.'Ill. Rev. Stat. ch. 43, ¶ 301.1(4). A 'person' is defined as '. . . a corporation [and its] . . . assigns . . ..'Id. at ¶301.1(5). Because the parties with which Triner had its distributor contract-Champale and Iroquois ('Champale/Iroquois')-'assigned various assets, formulae and trademark rights' to Heileman, and 'the Act clearly includes such 'assigns' within the very definition of a 'brewer',' Triner concludes it has adequately alleged a violation of the Act by Heileman. Triner Mem. at 11.

*2 The starting point for statutory interpretation is the language of the statute.Smith v. Bowen, 815 F.2d 1152, 1154 (7th Cir. 1987). Where a statute is clear and unambiguous on its face, a court is limited to enforcing the statute according to its terms.Id. Nevertheless, there are limitations on literal interpretation; a literal construction is inappropriate if it would lead to absurd results or would thwart the obvious purposes of the statute. Id. We find that the Act's use of the term 'assign' is ambiguous in that it does not clearly specify what assignments give rise to liability. To accept Triner's literal reading of the Act would lead to absurd results and undermine the purposes of the statute.

The express purpose of the Act is 'to promote the public interest in fair, efficient, and competitive distribution of malt beverage products.'Ill. Rev. Stat. ch. 43, ¶302. The Act's scope encompasses 'all relations between brewers and their wholesalers' (id.) and specifically governs 'agreements' defined as 'any contract, agreement or arrangement, . . . between a brewer and a wholesaler pursuant to which a wholesaler has been granted the right to purchase, resell and distribute any brand or brands of beer offered by the brewer.'Id. at ¶310.1(2). The provision of the Act under which Triner sues states that a brewer may not cancel or fail to renew an agreement with a wholesaler without good cause and at least 60 days notice.Id. at ¶305.

We therefore find that the Act applies only to parties in a distributorship agreement. The Act intends to promote 'fair, efficient, and competitive distribution.' It gives a remedy for bad faith cancellations of distributorship agreements. The only reasonable reading of the term 'assigns' is that the legislature meant 'assigns of a distributorship agreement.' To read the provision literally, as Triner advocates, would lead to absurd results and abrogate well-established rules of corporate law.

Suppose Brewer A assigns to Brewer B certain rights to a brewing facility it no longer uses. Brewer A then terminates one of its wholesalers without cause. The wholesaler attempts to sue both brewers under the Act. Clearly, Brewer B never expressly or implicitly assumed contractual liability to the wholesaler.

The language of the Act which gives a wholesaler a judicial remedy against a brewer who cancels a distributorship agreement without good cause requires the brewer to be in some relationship to the wholesaler-either as a direct party to the contract or as a third party who, as an assignee, has become a party to the agreement. Triner has not alleged that Champale/Iroquois assigned the distributorship agreement to Heileman, nor could Triner do so in good faith.

Furthermore, to read the Act literally would radically modify traditional notions of corporate law. As Heileman points out, a corporation which purchases the assets of another corporation is generally not liable for the contractual obligations of the selling corporation, unless it expressly accepts those obligations. Heileman Supplemental Memorandum at 3

('Heileman Suppl.'); see Shaw v. Republic Drill Corp., 810 F.2d 149 (7th Cir. 1987) (citing Illinois cases); 33 West Monroe Associates v. Trio Industries, No. 82 C 871, Memorandum Op. at 2 (N.D. Ill. April 22, 1985) (Grady, J.). While Triner contends that the Illinois legislature intended to abrogate this rule, it bases its argument on nothing more than the unconditional use of the word 'assign' in the statute. Triner Supplemental Memorandum at 4 ('Triner Suppl.'). The fact that the legislature included assignees in its definition of a person for the purposes of the Act is not enough, without more, for us to conclude that the legislature intended to impose liability on all assignees of brewers' assets.

*3 On a motion to dismiss, we accept the allegations of Triner's complaint as true, viewing them and any reasonable inferences to be drawn from them in the light most favorable to Triner, dismissing only if it appears beyond doubt that Triner 'can prove no set of facts in support of [its] claim which would entitle [it] to relief.'Harris v. WGN Continental Broadcasting Corp., 650 F. Supp. 568, 572 (N.D. Ill. 1986) (Grady, J.). In order for Triner to state a claim against Heileman, it must allege that Heileman was the assignee of the distributorship agreement between Champale/Iroquois and Triner. Because it is unable to do so, we dismiss Count I of Triner's complaint against Heileman, with prejudice.

Champale/Iroquois Motion to Dismiss

Champale/Iroquois move to dismiss both counts of Triner's complaint. Triner cannot maintain an action under the Act (Count I), they contend, because the Act does not apply to distributorship agreements entered into prior to the Act's effective date. Champale/Iroquois Memorandum in Support at 2 ('Joint Mem.'). Champale/Iroquois move to dismiss Count II, which alleges breach of contract, on two grounds: first, the agreement was oral and therefore terminable at will; second, the oral agreement is unenforceable under the Statute of Frauds. We begin with Count I.

Count I

Triner alleges that it entered into its agreement with Champale/Iroquois during the 1950's. Complaint at ¶15. The effective date of the Act is August 19, 1982.Ill. Rev. Stat. ch. 43, ¶311. The Act states, 'This Act shall apply to agreements entered into subsequent to the effective date of the Act.'Id. at ¶310. Champale/Iroquois conclude that Triner's claim is 'fatally defective because the Act does not apply to Triner's pre-existing distributorship agreement.'Joint Mem. at 4.

The Act clearly indicates it is not to be applied retroactively and Illinois courts have consistently held that a statute will not be applied retroactively absent a clear expression of legislative intent.Wilson-Raymond Constructors Co. v. Industrial Commission, 79 Ill.2d 45, 402 N.E.2d 584 (1980); General Motors Corp. v. Industrial Commission, 62 Ill.2d 106, 338 N.E.2d 561 (1975). Triner maintains that an exception to this rule applies: where parties materially alter or amend their contractual relationship after the effective date of the statute, the contract is then governed by the statute. Triner Mem. in Opposition to Joint Mem. at 4 ('Triner Mem. in Opp.'). Triner alleges that Champale/Iroquois significantly modified their existing agreement when Champale/Iroquois added a new Champale brand product to Triner's distribution line and specified the geographical territory over which Triner would distribute it. Complaint at ¶6 and Exhibit A. We are not persuaded by Triner's argument.

The 'exception' Triner claims is established by case law originates in the language of an amendment to the Wisconsin Fair Dealership Law ('WFDL'), Wis. Stats. § 135.02(2)(d) (1977). The original statute had prohibited cancellation or alteration, without good cause, of dealerships entered into after its effective date; the amendment eliminated the words 'entered into after the effective date of this act' and substituted the language that the statute governed 'all dealerships, including any renewals or amendments' after the Act's effective date of agreements entered into before the effective date.Id.

All the cases on which Triner relies involved application of this amendment. Kealy Pharmacy & Home Care Services, Inc. v. Walgreen Co., 761 F.2d 345 (7th Cir. 1985) (affirming lower court's construction of the effect of amendment to WFDL); Reinders Brothers, Inc. v. Rain Bird Eastern Sales Corp., 627 F.2d 44 (7th Cir. 1980) (holding that contracts renegotiated annually since 1974 were 'renewals' that brought dealership agreement made in 1959 within purview of WFDL); E.A. Dickson, etc. v. Simpson Electric Co., 509 F. Supp. 1241 (E.D. Wis. 1981) (addition of new product line was not an 'amendment or renewal' and therefore did not bring a pre-existing dealership agreement under WFDL's operation). The two other cases Triner cites for its proposition of law are also fact specific. Consumers Oil Corp. v. Phillips Petroleum Co., 488 F.2d 816 (3d Cir. 1973) involved a statute which contained language identical to that of the WFDL's amendment. C&J Delivery, Inc. v. Emery Air Freight Corp., 647 F. Supp. 867 (E.D. Mo. 1986) concerned whether the Missouri Franchise statute applied to contracts amended after the statute's effective date. In determining that the statute did apply, the court uncritically relied on the WFDL line of cases. Id. at 871. C&J Delivery assumed those cases were announcing a general principle of law rather than construing a particular statute. We will not make that assumption. Triner's 'exception' to the well-established prohibition against retroactivity is no exception at all. It is a statutory provision, properly interpreted. The Act before us contains no language to the effect that contracts 'amended or renewed' after its effective date are governed by the Act.

*4 Triner argues in the alternative that 'merely because Triner's complaint may relate to 'antecedent events'' application of the Act need not be 'retroactive.' Triner Mem. in Opp. at 9. Our refusal to apply the Act to Triner's 1950's distribution agreement does not rest on an analysis of retroactivity as much as it rests on the plain language of the statute concerning its effective date. Triner has not supplied us with any legally supportable justification for applying the statute to its distributorship agreement with Champale/Iroquois. Accordingly, Count I of the complaint is dismissed as to Champale/Iroquois.

Count II

Triner sues for breach of contract based on Champale/Iroquois' alleged termination without good cause. Triner alleges that its oral agreement with Champale/Iroquois to sell and distribute Champale brand products contained a tacit condition based on trade custom and usage which was 'known and well understood by all parties' that the agreement would be terminable only upon just cause. Complaint at ¶9. Champale/Iroquois move to dismiss this count, arguing that contracts for an indefinite period-such as the one alleged here-are terminable at will. Joint Mem. at 7. Champale/Iroquois further argue that allegations of trade custom cannot avoid settled rules of law. Joint Reply at 9. We acknowledge that as a general rule contracts that do not specify a time or duration are terminable at will. First Commodity Traders, Inc. v. Heinold Commodities, Inc., 766 F.2d 1007, 1012 (7th Cir. 1985) (construing Illinois law). It is not clear, however, that the parties did not agree to a termination condition. Triner alleges both parties understood the industry's custom of terminating distributorship agreements only upon just cause. On this motion to dismiss, we must accept this allegation as true. It is possible that Triner could prove the existence of such a custom and that both parties understood this custom to be a term of their agreement. Accordingly, we cannot grant Champale/Iroquois' motion to dismiss on the basis of this argument.

Champale/Iroquois contends that Count II is barred by the Statute of Frauds, Article II of the Uniform Commercial Code, Ill. Rev. Stat. ch. 26, ¶2-201 (1985) which states that 'a contract for the sale of goods for the price of $500 or more is not enforceable by way of action' unless the contract is in writing.[FN1] Joint Mem. at 9-10.

We are not persuaded by Champale/Iroquois' argument. First, Triner has appended to its complaint ample writings 'sufficient to indicate that a contract for sale has been made between the parties and signed by the party against whom enforcement is sought . . ..'Ill. Rev. Stat. ch. 26, ¶2-201(1); see Complaint at Exhibits A-C, F (Illinois Liquor Control Commission Registration Statement signed by Champale and three letters from Champale to Triner regarding distributorship agreement, respectively). Second, the doctrine of partial performance renders an otherwise unenforceable oral agreement enforceable, notwithstanding the Statute of Frauds.SeeIll. Rev. Stat. ch. 26, ¶2-201(3)(c). As Triner alleges it has been performing under the oral contract since the 1950's, it has 'partially performed' and the contract may be enforced at Triner's insistence.Allied Wire Products, Inc. v. Marketing Techniques, Inc., 99 Ill. App. 3d 29, 424 N.E.2d 1288, 1294 n.4 (1st Dist. 1981). We therefore deny Champale/Iroquois' motion to dismiss Count II of Triner's complaint.

Iroquois' Motion to Dismiss

*5 Iroquois moves to dismiss the complaint against it for lack of personal jurisdiction pursuant to Rule 12(b)(2). On April 17, 1987, we directed the parties not to brief the issue until Triner could take discovery. Discovery was to be completed in mid-June. Neither party has submitted memoranda in conjunction with this motion. We therefore deny Iroquois' motion.

CONCLUSION

Heileman's motion to dismiss is granted. Champale/Iroquois' motion to dismiss Count I of the complaint is granted. Its motion to dismiss Count II of the complaint is denied. Iroquois' motion to dismiss for lack of personal jurisdiction is denied. This case is set for a status hearing on Tuesday, October 20, 1987, at 9:30 a.m.

FN1 We previously held that distributorship agreements are governed by Article II of the Uniform Commercial Code.See Snellman v. A.B. Dick, No. 81 C 3048, Memorandum Op. at 21 (N.D. Ill. March 20, 1987) (Grady, J.).

N.D.Ill., 1987.
Joseph Triner Corp. v. Champale, Inc.
Not Reported in F.Supp., 1987 WL 18369 (N.D.Ill.)

END OF DOCUMENT

Westlaw.

H
Shestokas Distributing, Inc. v. Hornell Brewing Co., Inc.
N.D.Ill.,1993.
Only the Westlaw citation is currently available.
United States District Court, N.D. Illinois, Eastern Division.
SHESTOKAS DISTRIBUTING, INC., an Illinois corporation, Plaintiff,
v.
HORNELL BREWING CO., INC., a New York corporation, and United Beer Distributing Company, Inc., a New York corporation, Defendants.
No. 91 C 3985.

Feb. 16, 1993.

MEMORANDUM OPINION AND ORDER

LINDBERG, District Judge.
*1 Plaintiff, Shestokas Distributing, Inc., ("Shestokas"), has filed a motion for summary judgment against defendants for violation of the Illinois Beer Industry Fair Dealing Act, IllRevStat ch 43, § 301*et seq.* Defendants, Hornell Brewing Company, Inc. ("Hornell") and United Beer Distributing Company, Inc. ("United Beer"), have moved to dismiss plaintiff's complaint for failure to state a cause of action upon which relief can be granted.

United Beer owns the rights to the beer brand known as Midnight Dragon. On November 14, 1988, United Beer assigned the exclusive rights to manufacture, market, sell and distribute Midnight Dragon to the Hudepohl-Schoenling Brewing Company ("Schoenling"). United Beer retained the distribution rights for New York and New Jersey. No provision of the agreement gave United Beer the right to approve Schoenling's distributor appointments. The agreement provided that nothing in the contract would "be deemed or construed as granting United Beer or Hudepohl-Schoenling any right or authority to assume or create any obligation or responsibility, expressed or implied, for or on behalf of or in the name of the other, or to bind the other in any manner or way whatsoever."

In late January of 1989, Schoenling's Timothy Brown informed Shestokas that John Ferolito of United Beer needed to approve Shestokas' appointment as a distributor of Midnight Dragon and that Ferolito would not give his approval unless Shestokas first placed an order of an entire truck load of Midnight Dragon. According to Shestokas, this amount of beer was an unusual commitment to a new brand particularly in the winter when beer sales are traditionally slow. On February 3, 1989, Shestokas placed the order at Brown's urging. Ferolito claims that United Beer did not approve Schoenling's distributor appointments, nor condition its approval upon significant orders of Midnight Dragon.

On March 10, 1989, Schoenling appointed Shestokas and other beer wholesalers as distributors of Midnight Dragon. The distributor appointment executed by Schoenling expressly provided that Schoenling's appointment of Shestokas would continue as long as Schoenling retained its appointment from United Beer.

After its appointment as a distributor, Shestokas purchased all Midnight Dragon beer from Schoenling. In August of 1989, Schoenling arranged for its distributors to meet United Beer officials and observe United Beer's approach to marketing Midnight Dragon in New York and New Jersey. Following the trip to New York, Schoenling sent a letter to Shestokas which reiterated the suggestion made in New York that Shestokas commit at least one employee solely to selling Midnight Dragon. In September of 1989, Shestokas hired Lonnell Saffold as its Midnight Dragon manager. Shestokas paid half of Saffold's salary while Schoenling paid the other half.

In a letter allegedly from John Ferolito, dated May 8, 1990, Ferolito informed Shestokas that United Beer intended to terminate the distribution rights for both Shestokas and Schoenling. The letter was neither signed by Ferolito nor on United Beer letterhead. In fact, the letter had the same font as letters from Michael Schott of Schoenling, including his secretary's initials. Shestokas did not receive this letter until August of 1990 when it was attached to an August 1, 1990 letter from Schott. Schott's August 1, 1990 letter gave Shestokas sixty days notice of its termination as a distributor of certain Schoenling products. The notice of termination did not include Midnight Dragon. However, the letter stated that "[s]hould your July Midnight Dragon numbers reflect 'disaster', Ferolito has made it clear to me he is pulling the brand from both of us."

*2 In February of 1991, United Beer and Schoenling agreed to terminate their production and distribution agreement. The termination agreement provided that Schoenling would cease manufacturing and distributing Midnight Dragon on April 1, 1991. United Beer subsequently assigned the right to manufacture Midnight Dragon to G. Heileman Brewing Co. ("Heileman") and assigned the exclusive rights to market, sell and distribute the brand to Hornell, United Beer's sister company.

In a letter dated February 28, 1991, Schoenling advised its distributors that it would no longer handle the Midnight Dragon brand and suggested that they contact John Ferolito of United Beer or Robert Corsetti of Hornell if they wished to continue distributing Midnight Dragon. After receiving the letter, Shestokas contacted Ferolito to inquire into continuing as a Midnight Dragon distributor. Ferolito advised Shestokas that Corsetti was in charge of distributor appointments. On March 12, 1991, Corsetti sent Shestokas a letter which stated that "Heileman is ready to accept your orders for production in accordance with their ordering policies, when they are advised by Hornell that you have been appointed as our Distributor." The letter informed Shestokas that the enclosed forms were to be completed and returned by April 1, 1991. The letter further provided that "upon receipt of the completed forms, we will execute the necessary filing with your regulatory agencies and send you the procedure for placing your orders...." Shestokas completed and faxed the forms on April 8, 1991.

Corsetti subsequently visited the Shestokas operation and found the warehouse nearly empty and operations at a standstill. He declined to accept a purchase order from Shestokas for Midnight Dragon beer. In a letter dated June 10, 1991, Corsetti advised Shestokas of his decision not to appoint Shestokas as a Midnight Dragon distributor.

In resolving a motion to dismiss for failure to state a claim pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, the court must accept as true all well-pleaded allegations of fact and draw all inferences in the light most favorable to plaintiff. *Martin v. Youngstown Sheet & Tube Co.*, 911 F.2d 1239, 1241 (7th Cir1990). A complaint should not be dismissed for failure to state a claim unless it is beyond doubt that plaintiff could prove no set of facts which would entitle it to relief. *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99, 102 (1957).

Because the court must accept as true all well-pleaded allegations of fact, the court cannot rely on affidavits or exhibits not incorporated in plaintiff's complaint in determining whether the complaint states a claim. Rule 12(b)(6) provides that "if matters outside the pleadings are presented to and not excluded by the court, the motion [to dismiss] shall be treated as one for summary judgment pursuant to Rule 56." Given defendants' reliance on matters outside the pleadings, the court converts defendants' motion to dismiss to a motion for summary judgment.

*3 Under Rule 56(c), summary judgment is appropriate if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

FRCP 56(c). Once the moving party shows that there are no genuine issues of material fact, the burden of proof shifts to the nonmoving party to designate specific facts showing that there is a genuine issue for trial. *Celotex Corp. v. Catrett,* 477 U.S. 317, 324, 106 S.Ct. 2548 (1986). To defeat a motion for summary judgment, the nonmoving party must "make a showing sufficient to establish the existence of [the] element[s] essential to that party's case." *Id* at 322. The court must determine "whether a fair-minded jury could return a verdict for the plaintiff on the evidence presented. The mere existence of a scintilla of evidence in support of the plaintiff's position will be held insufficient." *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 252, 106 S.Ct. 2505, 2512 (1986).

The Illinois Beer Industry Fair Dealing Act ("Act") prohibits brewers and beer wholesalers from terminating an agreement to purchase, resell or distribute beer unless the brewer or wholesaler provides prior written notice to the other party. IllRevStat ch 43, § 303(1). Notification is to be sent by certified mail ninety days before the termination date and must contain a statement of intent to terminate the agreement, a complete explanation of the reasons for termination and the date on which the action is to take effect. *Id.* at § 303(2). Shestokas contends that the parties had an implied agreement under the Act because United Beer allegedly controlled the distribution agreement between Schoenling and Shestokas. Alternatively, Shestokas contends that the March 12, 1991 letter by Robert Corsetti of Hornell was an offer to enter into a new distribution agreement with Shestokas, which Shestokas accepted by filling out and returning the enclosed forms, and that Hornell subsequently failed to give proper notice of termination under the Act.

The Act defines an "agreement" as follows:

"Agreement" means any contract, agreement or arrangement, whether express or implied, whether oral or written, for a definite or indefinite period between a brewer and a wholesaler pursuant to which a wholesaler has been granted the right to purchase, resell and distribute any brand or brands of beer offered by a brewer. The agreement between a brewer and wholesaler shall not be considered a franchise relationship.

The facts fail to support plaintiff's argument that a distribution "agreement" existed between Shestokas and United Beer. United Beer entered into an agreement with Schoenling and assigned Schoenling the exclusive rights to brew and distribute Midnight Dragon. By assigning its distribution rights, United Beer delegated the responsibility of selecting distributors to Schoenling. Schoenling subsequently contracted with various subdistributors including Shestokas. The distribution agreement between Schoenling and Shestokas provided that Shestokas would continue as a Midnight Dragon distributor only as long as the agreement between United Beer and Schoenling was in effect. When United Beer terminated its production and distribution agreement with Schoenling, Schoenling promptly notified Shestokas that its distribution agreement with Shestokas was terminated. Schoenling further advised Shestokas to contact defendants if Shestokas wished to continue as a Midnight Dragon distributor.

*4 Shestokas contends that an implied agreement existed with United Beer because United Beer allegedly controlled the distribution agreement between Schoenling and Shestokas. Shestokas claims it was informed by Schoenling that United Beer would not approve its appointment as a distributor unless Shestokas purchased an entire truckload of Midnight Dragon. This representation, however, was made to Shestokas by Schoenling. No United Beer personnel ever communicated to Shestokas that United Beer had the authority to approve Schoenling's distributor appointments or that Shestokas' appointment was conditioned on significant orders of beer. Nothing in United Beer's agreement with Schoenling provided that United Beer had the right to approve Schoenling's distributor appointments.

Shestokas also refers to a May 8, 1990 letter al-

legedly from John Ferolito, which stated that United Beer intended to terminate the distribution rights for both Schoenling and Shestokas. This letter alone is insufficient to create a triable issue of material fact as to whether an agreement existed between Shestokas and United Beer. None of the elements necessary to establish an agreement, which the letter purports to cancel, are present. The court cannot reasonably infer the existence of an agreement based upon this "scintilla of evidence"-the letter was not on United Beer letterhead, was not signed by Ferolito and was not sent by United Beer. The letter appears to have been drafted by Michael Schott of Schoenling as it had the same type and format as Schott's letters, including his secretary's initials. There is no question that the draft letter was attached to a letter from Schott, dated three months later, which informed Shestokas that United Beer would pull Midnight Dragon from both Schoenling and Shestokas if July sales were not good.

Again, this representation was communicated to Shestokas by Schoenling, and not United Beer. The agreement between United Beer and Schoenling expressly provided that neither party had the right or authority to assume or create any obligation on behalf of the other or to bind the other in any manner whatsoever. Given this provision, Schoenling had no authority to make representations on behalf of United Beer. Schoenling also had no authority to bind United Beer to its distribution agreement with Shestokas. Similarly, activities which Shestokas undertook at Schoenling's urging, such as observing United Beer's marketing strategies in New York and hiring an employee solely dedicated to sales of Midnight Dragon, cannot now be attributed to United Beer. Based upon these undisputed facts, no implied agreement existed between Shestokas and United Beer.

The facts further fail to support Shestokas' contention that the parties entered into a distribution agreement following the termination of the agreement between United Beer and Schoenling. Shestokas claims that the March 12, 1991 letter from Robert Corsetti of Hornell was an offer to enter into a new distribution agreement, which Shestokas accepted by filling out and returning the requested forms. However, the March 12, 1991 letter expressly provided that Heileman would be ready to accept production orders only after Hornell appointed the recipient of the letter, Shestokas, as a distributor. The letter was therefore not an offer to enter into a contract but at best an invitation to deal. Hornell would not consider Shestokas for the position unless Shestokas filled out the enclosed forms. Even if the letter could be construed as an offer, Shestokas failed to timely accept it by the April 1, 1991 deadline. Therefore, Shestokas' April 8, 1991 response was at most a counter-offer which Hornell declined to accept. Hornell informed Shestokas on June 10, 1991 that it had decided not to appoint Shestokas as a Midnight Dragon distributor.

*5 To survive a motion for summary judgment, plaintiff must present sufficient evidence to show that there is a genuine issue of material fact. Because plaintiff has failed to present sufficient evidence to show that a triable issue of material fact exists as to whether the parties had an "agreement" under the Act, summary judgment is granted for defendants and against plaintiff.

ORDERED: Defendant's motion to dismiss, which the court has converted to a motion for summary judgment, is granted. Plaintiff's motion for summary judgment is denied. The Clerk is ordered to enter judgment for defendants and against plaintiff on a separate document pursuant to FRCP 58.

N.D.Ill.,1993.
Shestokas Distributing, Inc. v. Hornell Brewing Co., Inc.
Not Reported in F.Supp., 1993 WL 39696 (N.D.Ill.)

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Purizer Corp. v. Battelle Memorial Institute
N.D.Ill.,2002.
Only the Westlaw citation is currently available.
United States District Court, N.D. Illinois, Eastern Division.
PURIZER CORPORATION, Plaintiff,
v.
BATTELLE MEMORIAL INSTITUTE, Defendant.
No. 01 C 6360.

Jan. 7, 2002.

MEMORANDUM OPINION AND ORDER

LINDBERG, Senior J.
*1 Defendant Battelle Memorial Institute has moved pursuant to Federal Rule of Civil Procedure 12(b)(6) to dismiss plaintiff's complaint. For the reasons stated below, the motion to dismiss is granted in part and denied in part.

I. Factual Background

In considering a motion to dismiss, the court must accept as true all well-pleaded facts and must draw all reasonable inferences from those allegations in plaintiff's favor. *MCM Partners, Inc. v. Andrews-Bartlett & Assoc., Inc.*, 62 F.3d 967, 972 (7 th Cir.1995). According to the allegations in the complaint, in 1996 plaintiff acquired the rights to a technology that had previously been used to sterilize milk cartons (the "Purizer Vapor"). Plaintiff and defendant entered into a written agreement on December 11, 1998, under which defendant agreed to "provide a high standard of professional services on a best efforts basis" in performing research on the Purizer Vapor. This research project included characterization of the Purizer Vapor, a process which entailed describing the Purizer Vapor's chemical components and their proportions. Defendant represented to plaintiff that the Purizer Vapor consisted of oxygen, single oxygen, hydrogen peroxide and residual ozone, as well as more exotic components, such as singlet oxygen and hydroxyl radicals. Defendant was compensated in cash and stock.

In 1999, plaintiff and defendant entered into other written agreements, under which defendant agreed to investigate the suitability of the Purizer Vapor for various applications, and to design and construct the apparatus for use in these applications. None of these projects was completed during 1999, but defendant represented to plaintiff that the Purizer Vapor was suitable for these applications and that it was remarkably effective in reducing bacteria and other pathogens to almost undetectable levels.

Plaintiff decided to prepare a business plan to use in attracting investors. Defendant actively participated in preparing the business plan, and a draft of the plan referred to defendant as plaintiff's partner. The business plan stated that based on research completed by defendant, the Purizer Vapor consisted of highly reactive molecular oxygen, hydrogen peroxide, and hydroxyl radicals. The draft plan also stated that defendant had verified that the Purizer Vapor is 10,000 to 100,000 times more effective than ozone or ultraviolet light for sterilization and decontamination. A revised version of the business plan, prepared in 2000, stated that the Purizer Vapor was five times more effective than ozone alone in air, and forty percent more effective than ozone alone in water. Final drafts of the business plan were circulated to defendant's project manager and his superior, with a request that they identify any inaccuracies; defendant did not identify any inaccuracies in the business plan's representations regarding the Purizer Vapor's effectiveness as compared to ozone.

Defendant's representatives made the same representations to various Purizer executives and marketing consultants through 1999 and 2000 that had appeared in the draft business plan. Plaintiff distrib-

uted the final version of the business plan to potential investors at presentations, including two presentations held at defendant's headquarters in Ohio. Defendant's project manager and his superior spoke at the Ohio presentations. Plaintiff raised $17 million from investors through sales of preferred stock.

*2 On June 9, 2000, plaintiff and defendant executed a Master Research and Development Agreement. This contract terminated all then-existing contracts between plaintiff and defendant, and provided that all future work by defendant was to be conducted under its terms.

During 2000, the applications of the Purizer Vapor then underway all either failed or otherwise did not live up to the representations made by defendant. An independent expert in ozone technology, retained by plaintiff, determined that the Purizer Vapor was composed of ozone and hydrogen peroxide, and that more exotic components such as singlet oxygen and hydroxyl radicals were either not present or so transitory as to be undetectable. The expert reported that the technique underlying the Purizer Vapor had been known for over thirty years. Plaintiff abandoned the commercialization of the Purizer Vapor.

On August 16, 2001, plaintiff filed this action, alleging fraud, negligent misrepresentation, breach of contract, and unjust enrichment. Jurisdiction is based in diversity of citizenship.

II. Motion to Dismiss Standard

When ruling on a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), the court must consider "whether relief is possible under any set of facts consistent with the allegations of the plaintiff's complaint."*Pokuta v. Trans World Airlines, Inc.*, 191 F.3d 834, 839 (7 th Cir.1999). That is, if it is possible to hypothesize a set of facts that would entitle the plaintiff to relief, consistent with the allegations in the complaint, dismissal under Rule 12(b)(6) is inappropriate. *Graehling v. Village of Lombard*, 58 F.3d 295, 297 (7 th Cir.1995).

III. Discussion

A. Choice of Law

As a preliminary matter, the court must determine which state's law applies to this case. Defendant argues that Ohio law controls. Plaintiff contends that Illinois law governs, but only cursorily addresses the question of choice of law in a brief footnote in its response to defendant's motion to dismiss.[FN1]

> FN1. The parties agree that the choice of law provision in their contract, specifying that Delaware law applies, does not con- trol.

A court sitting in diversity must apply the choice of law rules of the state in which it sits-here, Illinois. *ECHO, Inc. v. Whitson Co.*, 52 F.3d 702, 707 (7 th Cir.1995). Illinois follows the Restatement (Second) of Conflict of Laws in making choice of law decisions. *Chapman & Assocs., Ltd. v. Kitzman*, 739 N.E.2d 1263, 1269 (Ill.2000). The Restatement uses the "most significant relationship test" to determine the applicable state law. *SeeSpinozzi v. ITT Sheraton Corp.*, 174 F.3d 842, 844 (7 th Cir.1999) (tort); *Palmer v. Beverly Enterprises*, 823 F .2d 1105, 1107 (7 th Cir.1987) (breach of contract); *Chapman & Assoc., Ltd.*, 739 N.E.2d at 1271 (unjust enrichment). Section 6 of the Restatement (Second) of Conflict of Laws sets forth general factors that courts consider in making choice of law decisions, which include the relevant policies of the forum and other interested states, the relative interests of those states in the determination of the particular issues, and the basic policies underlying the particular fields of law. Restatement (Second) of Conflict of Laws § 6(2) (1971). Neither party cites any policy applicable to the fields of law at issue here, or any policy or interest of Illinois or Ohio to support either party's position.

*3 The Restatement also provides relevant factors

governing choice of law issues in various specific areas of law. *See, e.g.,*Restatement (Second) of Conflict of Laws §§ 148 (fraud and misrepresentation), 188 (contract), and 221 (restitution) (1971). As applied to plaintiff's fraud and negligent misrepresentation claims, factors relevant to the "most significant relationship" test include the place where the plaintiff acted in reliance on the defendant's representations; the place where the plaintiff received the representations; the place where the defendant made the representations; the domicile, residence, nationality, place of incorporation and place of business of the parties; the place where a tangible thing which is the subject of the transaction was situated; and the place where the plaintiff is to render performance under a contract which he has been induced to enter by the defendant's false representations. Restatement (Second) of Conflict of Laws § 148(2) (1971).

In this case, although the complaint does not say so, plaintiff presumably relied on defendant's misrepresentations to some extent in Illinois, where its principal place of business is located.[FN2]All the misrepresentations for which the complaint specifies a location were made and received in Ohio.FN3 Plaintiff is a Nevada corporation, with its principal place of business currently in Illinois; when its relationship with defendant began, plaintiff's principal place of business was in Utah. Defendant is organized under Ohio law, and maintains its principal place of business in that state. Finally, defendant's performance that is the subject of the misrepresentations took place in Ohio. The state with the most significant relationship to the events and parties is Ohio, and consequently, the court will apply Ohio law to the fraud and negligent misrepresentation claims.

FN2. Plaintiff claims in its response to the motion to dismiss that it acted on defendant's misrepresentations in Illinois, but the complaint itself is silent on the issue.

FN3. Plaintiff claims in its response that it received many of the alleged misrepresentations by defendant in Illinois, but there are no allegations in the complaint that any was received there.

In evaluating a choice of law issue relating to a breach of contract claim, the court must consider the place of contracting; the place of negotiation of the contract; the place of performance; the location of the subject matter of the contract; and the domicile, residence, nationality, place of incorporation, and place of business of the parties. Restatement (Second) of Conflict of Laws § 188(2) (1971). In this case, the complaint does not specify the place of contracting and negotiation,[FN4] and the place of business of the parties is split between Illinois and Ohio. Thus, the place of performance becomes the critical factor, weighing in favor of Ohio. This result is consistent with the Restatement's treatment of choice of law issues relating to service contracts, FN5 which provides that the law of the state where the services are to be rendered governs. *See*Restatement (Second) of Conflict of Laws § 196 (1971). Defendant performed its work in Ohio, and therefore, the court will apply Ohio law to the breach of contract claim.

FN4. Plaintiff claims in its response that contract negotiations took place in Illinois, and that it signed the contract here, but again the complaint itself is silent on these points.

FN5. The Master Research and Development Agreement provides that plaintiff "specifically acknowledges that Battelle is a service provider."

Finally, factors relevant to an evaluation of an unjust enrichment claim include the place where a relationship between the parties was centered, as long as the receipt of enrichment was substantially related to the relationship; the place where the enrichment was received; the place where the act conferring the enrichment was done; the domicile, residence, nationality, place of incorporation and place of business of the parties; and the place where a

physical thing which was substantially related to the enrichment was situated at the time of the enrichment. Restatement (Second) of Conflict of Laws § 221(2) (1971). The place where a relationship between the parties was centered is the factor that is given the greatest weight. *Id.* cmt. d. The relationship between the parties was centered in Ohio, where the misrepresentations were made that led to the enrichment, and where defendant's work was performed. The complaint is silent as to where payment by plaintiff to defendant was made.[FN6]Again, Ohio is the state with the most significant relationship in relation to the unjust enrichment claim, and the court will apply Ohio law to that claim as well.

FN6. Plaintiff claims in its response to the motion to dismiss that payment was issued to defendant in Illinois, but no allegation in the complaint supports that assertion.

B. Fraud and Negligent Misrepresentation (Counts I and II)

*4 Defendant argues that plaintiff's fraud and negligent misrepresentation claims should be dismissed because they do not allege damages independent of those alleged in its breach of contract claim. Ohio law has long held that the existence of a contract action generally excludes the opportunity to present the same case as a tort claim. *SeeKetcham v. Miller,* 136 N.E. 145 (Ohio 1922)."It is not a tort to breach a contract, no matter how willful or malicious the breach."*The Salvation Army v. Blue Cross & Blue Shield of N. Ohio,* 636 N.E.2d 399, 403 (Ohio Ct.App.1993). A breach of contract action may not be transformed into a tort action by adding adverbs such as "intentionally," "wilfully," and "fraudulently." *Id.* Thus, for a plaintiff to maintain claims under both breach of contract and tort, it must show a breach of a legal duty independent of the contractual duty. *Teknol, Inc. v. Buechel,* 1999 WL 33117391, at *4 (S.D.Ohio Aug. 9, 1999); *Cincinnati Gas & Elec. Co. v. General Elec. Co.,* 656 F.Supp. 49, 63 (S.D.Ohio 1986); *Bowman v. Goldsmith Bros. Co .,* 109 N.E.2d 556, 557 (Ohio Ct.App.1952).

In this case, plaintiff's negligent misrepresentation and fraud claims are intertwined with its breach of contract claim. The breach of contract claim alleges that defendant breached the Master Research and Development Agreement by:

failing to provide a high standard of professional services on a best efforts basis in characterizing the chemical constituents of PURIZER's technology; assessing and describing the comparative effectiveness of the PURIZER Vapor and ozone; and designing and implementing experimental applications of the technology.

The negligent misrepresentation and fraud claims allege that defendant misrepresented the chemical components of the Purizer Vapor and its effectiveness compared to ozone. The relationship between plaintiff and defendant is contractual, and is not based in some independent legal source. Plaintiff therefore cannot maintain its negligent misrepresentation and fraud claims independent of its breach of contract claim.

In any event, the economic loss doctrine would also bar at least plaintiff's negligent misrepresentation claim.[FN7]Ohio law provides that a plaintiff cannot recover purely economic losses in a cause of action sounding in negligence. *Chemtrol Adhesives, Inc. v. American Mfrs. Mut. Ins. Co.,* 537 N.E.2d 624, 635 (Ohio 1989). This rule applies to claims of negligent misrepresentation. *Picker Int'l, Inc. v. Mayo Found.,* 6 F.Supp.2d 685, 688-89 (N.D.Ohio 1998). Here, plaintiff seeks to recover damages for the costs it incurred in preparing to market the Purizer Vapor; it does not allege any personal injury or property damage occurring as a result of defendant's representations. Ohio law bars plaintiff from recovering these economic losses through a negligent misrepresentation claim.

FN7. The issue of whether the economic loss doctrine would bar a fraud claim appears to be unsettled under Ohio law.

Trgo v.. Chrysler Corp., 34 F.Supp.2d 581, 595 (N.D.Ohio 1998). Other states have come down on either side of the issue. *CompareFirst Valley Leasing, Inc. v. Goushy,* 795 F.Supp. 693, 699 (D.N.J.1992) (New Jersey law does not bar parties with a Uniform Commercial Code claim from recovering fraud damages for purely economic loss) *with Dinsmore Instrument Co. v. Bombardier, Inc.*, 199 F.3d 318, 320-21 (6 th Cir.1999) (Michigan law bars fraud claims for economic loss).

C. Breach of Contract (Count III)

Defendant argues that plaintiff waived its right to bring a breach of contract claim in a limitation of liability clause. This limitation of liability clause, contained in the Master Research and Development Agreement, provides:

*5 Purizer assumes all responsibility for its use, misuse, or inability to use the results of any task or Project performed pursuant to this Agreement, and in no event shall Battelle have any liability for damages, including but not limited to any indirect, incidental or consequential damages, arising from or in connection with this Agreement.

Although limitation of liability clauses are generally enforceable under Ohio law, they are ineffective where the defendant's misconduct was willful or reckless. *Berjian, Inc. v. Ohio Bell Tel. Co.*, 375 N.E.2d 410, 416-17 (Ohio 1978). Defendants contend that the breach of contract claim does not allege such willful or reckless misconduct. While this is true, plaintiff's fraud claim contains an allegation of willful and reckless misconduct. The court reads the complaint as a whole and in the light most favorable to plaintiff, and finds the allegations are sufficient to overcome defendant's motion to dismiss the breach of contract claim based on the limitation of liability clause.

D. Unjust Enrichment (Count IV)

Finally, defendant contends that plaintiff's unjust enrichment claim should be dismissed because Ohio law prohibits recovery under an unjust enrichment theory when a contract governs the relationship between the parties. Plaintiff responds that it has properly pled the claims as alternative theories. While it is true that plaintiff could not recover under both unjust enrichment and contract theories, *seeR.J. Wildner Contracting Co. v. Ohio Turnpike Comm'n*, 913 F.Supp. 1031, 1043 (N.D.Ohio 1996), that fact does not prohibit plaintiff from pleading them in the alternative. *See*Fed.R.Civ.P. 8(e)(2) ("A party may also state as many separate claims or defenses as the party has regardless of consistency and whether based on legal [or] equitable ... grounds.").

However, defendant further argues that the form of the complaint does not comport with alternative pleading requirements, noting that the unjust enrichment count incorporates by reference paragraphs alleging the existence of contracts. Other courts in this district have taken a similar view of the technical requirement of Rule 8(e)(2).*See, e.g.,Samuels v. Old Kent Bank*, 1997 WL 458434, at *14-15 (N.D.Ill.1997); *Allied Vision Group, Inc. v. RLI Prof'l Techs., Inc.*, 916 F.Supp. 778, 782 (N.D.Ill.1996). While a plaintiff need not use particular words to plead in the alternative, it must use a formulation from which it can be reasonably inferred that this is what it is doing. *Holman v. Indiana*, 211 F.3d 399, 407 (7 th Cir.), *cert. denied*,531 U .S. 880 (2000). The court agrees that if plaintiff intended to plead its unjust enrichment claim as an alternative theory to its breach of contract claim, it has not been sufficiently clear in its method. Accordingly, Count IV is dismissed without prejudice.

ORDERED: The motion to dismiss is granted with prejudice as to Counts I and II; granted without prejudice as to Count IV, and denied as to Count III. Plaintiff is given until January 22, 2002 to amend Count IV; failure to do so will result in its dismissal with prejudice.

N.D.Ill.,2002.

Purizer Corp. v. Battelle Memorial Institute
Not Reported in F.Supp.2d, 2002 WL 22014 (N.D.Ill.)

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